HONG KONG BANK MALAYSIA BHD

v.

NOR HARIZAN MOHD ALI

HIGH COURT MALAYA, TEMERLOH
AZHAR MA'AH J
[ORIGINATING SUMMONS NO: 24-117-96]
22 MARCH 1999

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1*

BANKING: *Securities for advances - Charge - Claim for further sum - Whether chargor only liable up to amount covered by stamping*

The defendant's land was charged as security for a loan of RM100,000 granted by the plaintiff to a third party. The third party defaulted in repayments. Accordingly, the plaintiff issued the statutory notice Form 16D under the National Land Code 1965 to the defendant. The defendant failed to remedy the breach specified therein. Hence, the instant application by way of an originating summons ('OS') to sell the defendant's land by public auction.

There were two issues: (1) whether the plaintiff could claim for a further sum of money in view of the fact that the stamp duty paid covered only the loan of RM100,000 granted to the third party; and (2) whether the affidavit-in-support affirmed a week earlier than the OS was inadmissible based on *Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor*.

Held:

[1] The intitulement of the supporting affidavit was the title of the cause or matter that an affidavit should have as required under O. 41 r. 1 of the Rules of the High Court 1980. Case number given by the court registry upon filing of an OS is for administrative purpose and can hardly be considered as title in a cause or matter. Swearing of an affidavit that bears no registration number of the case does not violate any provision of the law as it stands as the originating process has not begun. To disallow the supporting affidavit for reasons stated in *Arab-Malaysian Finance Bhd*, would militate against the basic principle of justice.

[2] Any additional amount of loan issued by the plaintiff to the third party would attract additional stamp duty. By virtue of s. 91 of the Evidence

Act 1950, the contents of a document must be proved by the document itself. Section 92 of the same Act provides that subject to certain provisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms.

[3] No evidence was adduced by the plaintiff that upstamping was done for the additional loan facilities. As the stamp duty paid covered only a loan of RM100,000, no evidence of loan in excess of that amount should be admitted. As such, the defendant partly succeeded in showing cause to the contrary. The defendant's liability under the charge is only to the extent of RM100,000 plus interest as provided under the loan agreement.

[Land to be sold by public auction to satisfy plaintiff chargee's claim of RM100,000 with outstanding interest.]

Case(s) referred to:
Arab-Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(refd)***
Northman v. Barnett Council [1978] 1 WLR 221 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
National Land Code 1965, s. 254
Rules of the High Court 1980, O. 41 r. 1
Stamp Act 1949, ss. 4, 52

For the plaintiff - V Vishnu Kumar; M/s Sykt Kam Woon Wah
For the defendant - Vickneswary; M/s V Manickam & Partners

Reported by Usha Thiagarajah

JUDGMENT

Azhar Ma'ah J:

The defendant is the registered owner of Land Lot 3954, Geran 1695, Mukim Gali, Daerah Raub, Pahang which she mortgaged to the plaintiff in order to secure a loan of RM100,000 granted by the latter to a third party (the borrower).

The borrower failed to repay the loan with accrued interest. As a result the plaintiff through their solicitors, issued the statutory notice in Form 16D under s. 254 of the National Land Code 1965 to remedy the breach within 30 days of the receipt of the said notice failing which the plaintiff would apply for an order for sale.

The defendant chargor neglected to remedy the breach specified in the statutory notice. This led the plaintiff chargee to taking out an Originating Summons for an order to sell the land by public auction. The originating summons was filed on 25 September 1996 together with a supporting affidavit of the plaintiff chargee's branch manager which was sworned on 17 September 1996. The outstanding sum due to the plaintiff chargee as at 26 August 1996 was said to be RM253,585.02 with further interest thereon at an additional daily rate of 12.25% per annum.

In opposition to the plaintiff chargee's application counsel for the defendant chargor raised two issues. Firstly, the court's attention was drawn to the charge instrument. At the top right hand corner of the first page of the document there is an endorsement that reads "Gadaian Asal bersetem RM500 untuk pinjaman sebanyak RM100,000". In this connection counsel further referred to cl. 39 of the charge annexure. The relevant portion of the clause reads "In the event the total moneys and liabilities due and owing to the chargee hereunder shall at any time exceed the principal limit or the limit for which the security created shall for the time being have been stamped to secure, the chargee shall be at liberty at any time to, without further reference to and without the consent of the chargor, upstamp the security, created herein for the excess amount ... ."

It was submitted for the defendant chargor that there was no evidence of upstamping by the plaintiff chargee to support the latter's claim of additional sum of money having been advanced to the borrower in excess of the original RM100,000 for which the charge was created.

The second issue raised by the defendant chargee was with regard to the affidavit of the plaintiff chargor's branch manager filed in support of the originating summons. Counsel pointed out that the deposition was made and sworned on 17 September 1996 preceding the originating summons that was filed on 25 September 1996. Citing *Arab Malaysian Finance Bhd, v. (1) Serajudin Mohd Ismail (2) Hjh Mas Normah Mas Junid* Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur (Bahagian Sivil), Saman Pemula No.: S2-24-680-1997 (unreported) it was submitted that the affidavit was defective and thus inadmissible. In that case by reason of the supporting affidavit sworned 1 week prior to filing of the Originating Summons it was held by His Lordship Dato' RK Nathan that such affidavit was a nullity and its effect incurable. He therefore dismissed the originating summons.

For convenience and to avoid futility in the court's finding it would be appropriate for me to deal with the second issue first.

In *Arab Malaysian Finance Bhd*., the learned judge in his judgement made a specific reference to O. 41 r. 1 of the Rules of the High Court which seemed to be the pivot of his decision, O. 41 r. 1 reads:

> Subject to paragraphs (2) and (3) every affidavit sworn in a cause or matter must be entitled in that cause or matter.

Taking up from this proviso what is required in an affidavit that is to be used in support of an originating summons is a title to be given to it. The title, to my mind should relate to the subject matter of the cause of action. In the instant case the intitlement on the front page of supporting affidavit reads:

DALAM MAHKAMAH TINGGI MALAYA DI TEMERLOH

DALAM NEGERI PAHANG DARUL MAKMUR

(BAHAGIAN SIVIL)

SAMAN PEMULA NO: 24-117-96

Dalam perkara Gadaian pihak yang ketiga yang ditandatangani oleh NOR HARIZAN BINTI MOHD ALI (KP No. 5941959) untuk menjamin pembayaran daripada ZAINUDIN BIN HAJI HASHIM @ HAJI CHIN kepada Hongkong Bank Malaysia Berhad melalui Gadaian Perserahan No. 5878/93 Jilid 332 Folio 79 yang bertarikh 11hb. November 1993 ke atas hartanah di bawah Lot No. 3954 Geran No. 1695 Mukim Gali, Daerah Raub, Pahang Darul Makmur

DAN

Di dalam perkara seksyen 256 dan 257 Kanun Tanah Negara 1965.

DAN

Di dalam perkara Aturan 7 Kaedah-kaedah Mahkamah Tinggi 1980

ANTARA

HONGKONG BANK MALAYSIA BERHAD PLAINTIF

DAN

NOR HARIZAN BINTI MOHD ALI DEFENDAN

This entitulement, in my view is the title of the cause or matter that an affidavit should have as required under O. 41 r. 1.

Case number that is given by court registry upon filing of an originating summons is for administrative purpose and can hardly be considered as title in a cause or matter.

Swearing of an affidavit that bears no registration number of the case as the originating process has not begun does not violate any provision of the law as it stands. To hold otherwise would undoubtedly result in grave hardship and unnecessary inconvenience to the parties concerned. In this connection it would be relevant to quote what Lord Denning MR had to say in *Northman v. Barnett Council* [1978] 1 WLR 221:

> In all cases now in the interpretation of statutes, we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for judges to wring their hands and say:
>
> There is nothing we can do about it.
>
> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it by reading words in if necessary, so as to do what Parliament would have done, had they had the situation in mind.

I dare say, the Rules Committee in formulating the rules as they are did not have the slightest intention to cause hardship and inconvenience let alone injustice to the parties concerned.

Where faced with a situation where interpretation of a statute would lead to absurdity and injustice, the court should use its good sense to give such statute its widest and most liberal meaning so that the parties would not suffer injustice. It is presumed that Parliament does nothing in vain.

In the present case to disallow the supporting affidavit to be used in support of the plaintiff chargee's application for reasons stated in *Arab Malaysian Finance Bhd.*, which I am sorry to say I do not subscribe would millitate against basic principle of justice. For the above reasons counsel's objection to the affidavit in question is over ruled.

I now move on the first issue.

On this issue no explanation was advanced on behalf of the plaintiff chargee. According to the endorsement a stamp duty of RM500 was paid in respect of RM100,000 loan. Clearly it was made pursuant to s. 4 and in accordance with the First Schedule of Stamp Act 1949. Any additional amount of loan to be

issued by the plaintiff chargee to the borrower would definitely under the law attract additional stamp duty. In this respect regard must be had to s. 52 of the Act which provides:

> (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties to receive evidence ... unless such instrument is duly stamped.

To my mind the words "duly stamped" must necessarily mean that the instrument concerned should not only be stamped as required under s. 4, it must also be stamps in accordance with the First Schedule of the Act.

The plaintiff chargee's branch manager in his supporting affidavit (KM2) at para. 6 deposed that as at 26 January 1996 the total sum of money owed by the borrower to the bank was RM241,904.09 with interest of 12.25%.

A further affidavit, this time by the plaintiff chargee's subsequent branch manager was filed on 16 September 1998. In para. 8 of the said affidavit (KM75) it was deposed that subsequent to the registration of the change the bank had on five occassions gradually increased the loan facilities to the borrower until it finally reached a figure of RM600,000.

With this scenario it is also appropriate to look at the relevant provisions under the law of evidence s. 91 of the Evidence Act 1950 reads.

> When the terms of a contract or of a grant of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms.

The above provision provides that the contents of a document must be proved by the document itself, and s. 92 provides that subject to certain provisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms.

In our case here no evidence was adduced by the plaintiff chargee that upstamping was done for the additional loan facilities of RM500,000. As the stamp duty paid covered only a loan of RM100,000, no evidence of loan in excess of that amount should be admitted. In the circumstances I hold that the defendant chargor has partly succeeded in showing cause to the contrary. That compels me to make an order that the defendant chargee's liability under the charge is only to the extent of RM100,000 plus interest as provided under the agreement.

I therefore make an order that the land in question is to be sold by a public auction in order to satisfy the plaintiff chargee's claim to the extent of RM100,000 with the outstanding interest.

Order is also made for costs.